Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

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DATE: June 11, 1997

CASE NO: 95-INA-640

In the Matter of:

FARMINGDALE AUTO COLLISION,
Employer,

On Behalf of:

CASWELL C. COHEN,
Alien

Appearance: F. X. McQuade, Esq., of Long Beach, New York.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Caswell C. Cohen (Alien), by Farmingdale Auto Collision, Inc., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the case. On October 5, 1993, the Employer filed this application for labor certification to enable the Alien, who is a national of Jamaica, to fill the employment opportunity position of "Automobile Body Repairman" in the Employer's Auto Body Repair Business at Farmingdale, New York, New York. The duties of the position offered were described as follows in Form ETA 750:

> Repair damaged bodies and body parts of automotive vehicles, such as automobiles and light trucks.

AF 01-04. The position described in the Employer's application was classified as an "Auto Body Repairer"[2] under Occupational

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[2]**807.381-010 AUTOMOBILE-BODY REPAIRER (automotive ser.) alternative titles: automobile-bodyworker; body-line finisher; body repairer, bus; dent remover; door repairer, bus; metal bumper; metal shrinker; metal worker; touch-up finisher, metal**. Repairs damaged bodies and body parts of automotive vehicles, such as automobiles, buses, and light trucks according to repair manuals, using handtools and power tools : Examines damaged vehicles and estimates cost of repairs [SHOP ESTIMATOR (Automotive ser.) 807.267-0'10]. Removes upholstery, accessories, electrical and hydraulic window-and-seat-operating equipment, and trim to gain access to vehicle body and fenders. Positions dolly block against surface of dented area and beats opposite surface to remove dents, using hammer. Fills depressions with body filler, using putty knife. Removes damaged fenders, panels, and grills, using wrenches and cutting torch, and bolts or welds replacement parts in position, using wrenches or welding equipment. Straightens bent automobile frames, using pneumatic frame straightening machine. Files, grinds, and sands repaired surfaces, using power tools and handtools. Refinishes repaired surface, using paint spray gun and sander. Aims headlights, aligns wheels and bleeds hydraulic brake system. May paint surfaces after performing body repairs and be designated Automobile-Body Repairer, Combination (automotive ser.) May repair or replace defective mechanical parts. [AUTOMOBILE MECHANIC (automotive ser.) 620.261-010].

Code No. 807.381-010 of the Dictionary of Occupational Titles.[3] The wage rate offered was $15.00 per hour for a forty hour week, with overtime as needed at $22.50 per hour, in a workday that started at 9:00 A.M. and ended at 5:00 P.M. As the educational qualifications the Employer required completion of high school, with "Automobile Body Repair" as the Major Field of Study. The Employer also required four years of training in "Trade Sch. etc.," and four years of Experience in the Job Offered.

Alien's qualifications. In Jamaica the Alien, who was thirty-nine years old at the time of application, received a school leaving certificate in 1966 at the age of twelve. He later entered a "comprehensive technical high school" in 1969 and in 1973 was awarded a diploma indicating specialization in auto body repair. AF 02. The Alien worked as an auto body repairman in a general auto repair business until the end of 1981.[4] He became employed in the same work in Brooklyn, New York from March 1982 to May of 1985, and in June 1987 was hired by the Employer to do this work, remaining on this job until July 1988. After this date, the Alien was self-employed in this work. AF 18.

Notice of Finding (NOF). Although the resumes of four U. S. applicants were referred for this position by the New York State Department of Labor, no U. S. worker was hired. On March 31, 1995, the CO advised the Employer in the NOF that certification would be denied, subject to rebuttal on or before May 5, 1995. AF 55-59.

1. Citing 20 CFR § 656.24(b)(2)(i), the CO said the Employer had failed to test the available U. S. labor market, observing that the newspaper in which the advertisement was placed was aimed at the Long Island market, while the four workers who had responded lived in New York City. AF 58. Rebuttal for this defect would require readvertising the job in another newspaper.

2. Citing 20 CFR 656.21(b)(2), the CO observed that, although the combined education and training for the job was two to four years in the DOT, the Employer required four years of vocational training and two and one-half years of experience on the job, a total of six and one-half years. This led the CO to infer that Employer's requirements are excessive, restrictive, and were tailored to the experience of the Alien. AF 58. Rebuttal for this defect would require Employer either to delete or modify the training criteria to meet DOT standards or to

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[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[4]The application suggests that the Alien was self-employed until his shop was destroyed in a hurricane. AF 19.

document that its training requirement arose from its business necessity under 20 CFR § 656.21(b)(2)(i).[5]

3. Citing 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), the CO said that the U. S. applicant resumes, Employer's recruitment report, and the responses from the U. S. applicants to the post recruitment follow up letter indicated that (1) three of the four respondents were qualified for the position, (2) that Employer appeared to find Mr. Gutierrez qualified and (3) that Employer failed to interview Mr. Rojas and Mr. Philogene. The Employer was directed to document its conclusions that these three job candidates were not qualified by education, training, experience, or a combination thereof to carry out the duties of this job in a normally acceptable manner as such work customarily is performed by other U. S. workers similarly employed. AF 55-56.

Rebuttal. On April 19, 1995, the Employer transmitted its response to the NOF.

1. As to the advertising the Employer's agent said it wold readvertise in the manner specified in the NOF, if so directed. AF 66.

2. As to its training and experience requirements, Employer said it was willing to change the requirements to conform to the NOF by reducing the training to two years adding that it was willing to readvertise, as directed. AF 66.

3. The Employer said it was not satisfied with the way in which Mr. Gutierrez was prepared to perform the work. It did not challenge his experience or training. The Employer said it had tried to reach Mr. Rojas and had failed, adding that it was willing to interview him, if directed and to employ him if he was qualified. Employer finally said that, regardless of whether or not his experience was sufficient, it did not intend to employ Mr. Philogene because of his employment history. AF 65.

Final Determination. The CO denied certification in the Final Determination (FD), dated May 8, 1995. AF 67-69. Having considered the Application, the NOF, and Employer's Rebuttal, the CO found that Employer did not meet the requirements of 20 CFR, Part 656, and that there are U. S. workers available who are able willing and qualified for this job and whose rejection by the Employer was for reasons that were not lawful and job-related.

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[5]The CO explicitly ordered that the Employer must elect either to delete the offending hiring criteria or to establish the business necessity of the criteria that it stated in its application. The CO expressly withheld from the Employer the option both (1) to document its business necessity and (2) to offer to delete or amend the job requirements the CO had found to be offensive in the event that Employer’s rebuttal proof of business necessity is not accepted. AF 57.

Observing that the NOF required Employer to establish by rebuttal that the three U. S. workers above-named were not qualified, willing or available at the time of initial consideration and referral, the CO said the Employer failed to respond and that its representative had furnished such rebuttal information instead, citing 20 CFR § 656,21(j). Even though the CO disqualified the credibility of Employer's rebuttal for this reason, the rebuttal was fully considered and weighed, subject to this defect.

The CO rejected Employer's objections to Mr. Gutierrez' approach to automobile repairs, concluding that it had failed to establish that this U S. applicant could not perform the job duties within the meaning of the Act and regulations in view of his lengthy auto body repair experience. AF 68. The CO further found that the Employer had failed to provide a sufficient explanation for its failure to contact Mr. Rojas. AF 67. Lastly, the CO said that Employer's basis for judging the qualifications of Mr. Philogene was "highly subjective" and could not be confirmed in view of its failure to contact this job candidate. The CO added that, "Although subjective reasons for rejection are not, by themselves, unlawful reasons for rejection, it is the Employer's failure to provide a reasonable basis for making the subjective rejection which is objectionable." AF 67. The CO then concluded that the Employer had failed to establish that it made a good faith effort to recruit U. S. workers and consequently the CO denied certification. AF 67.

Appeal. By way of supporting its appeal the Employer's agent restated the Employer's reasons for rejecting these workers, this time stating that the assertions were made at the instruction of the Employer.

Discussion. Since the Employer did not verify these facts by her signature or in any other manner, the immigration agent's remarks are no more persuasive in the appeal than they were in the NOF.

The Employer has the burden of proof as to all of the issues arising under the Act and regulations, in view of the privileged status which certification would confer on the Alien in this case as an exception a statutory limitation on immigration for permanent residence and employment in the United States. The reason is that Certification is a privilege that the Act confers by giving favored treatment to specified foreign workers, whose skills Congress seeks to bring to the U. S. labor market to meet a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). This is expressly addressed in 20 CFR § 656.2(b), which quoted from § 291 of the Act (8 U. S. C. § 1361) the burden of proof that Congress has placed on Employers and Aliens seeking labor certification:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act ... .

As the certification for the Alien that the Employer seeks under the Act as an exception to its broad limits on immigration into the United States, the evidence offered under the Act is strictly construed under the principle that

> Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption.

73 AmJur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896)[6]. It follows that the Employer must present evidence that is commensurate with the favorable and advantageous treatment that it seeks in applying for special permission for this Alien to enter the United States lawfully and hold this position of permanent employment. **Japan Budget Travel International, Inc.,** 90-INA-277 (Oct. 7, 1991).

In this case the Employer has failed to sustain its burden of proof on issues leading to a determination as to whether or not its rejection of U. S. workers was lawful. **Cathay Carpet Mill, Inc.**, 87-INA-161(Dec. 7, 1988)(en banc). In this case the Employer was directed to establish the lack of qualification of three applicants. First, there is nothing in the statements the Employer's immigration agent offered to suggest Mr. Gutierrez was not qualified and available at the time the resumes were referred for the its consideration for this job. Second, while Employer's explanation for rejecting all of the candidates are unverified, the evidence offered in this way, even if credible in spite of this defect, is not persuasive because in each instance the reasons given are based on the Employer's subjective and speculative reasons that cannot be measured against any objective criterion.

For these reasons it is concluded that the Employer failed to proceed in good faith in recruiting workers to fill the position at issue in that it did not establish that its rejection of these U. S. applicants whose qualifications were not otherwise

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[6]In construing a tariff act, the Supreme Court there held that, "Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption," citing its previous decisions in **People v. Cook**, 148 U.S. 397, 13 SCt 645; and **Keokuk & W. R. Co. v. Missouri**, 152 U. S. 301, 306, 14 SCt 592.

in question was supported by lawful job-related reasons. **H. C. LaMarch Ent. Inc**., 87-INA-607(Oct. 27, 1988). Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed for the reasons hereinabove stated.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

FARMINGDALE AUTO COLLISION, Employer,
CASWELL C. COHEN, Alien

CASE NO: 95-INA-640

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 27, 1997